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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 90

MAGNOLIA MOTOR & LOGGING CO., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 38–45; Pet. App. i–x)[1] is reported at 264 F. 2d 950. The memorandum opinion of the District Court, denying petitioner's motion to dismiss the indictment (R. 6–12; Pet. App. xi–xvii), is reported at 150 F. Supp. 310.

[1] "R." refers to the printed record in the Court of Appeals (consisting of the indictment, judgment, sentence, opinions and orders of the District Court, and other trial papers and pleadings), to which has been appended the proceedings in the Court of Appeals. "Tr." refers to the reporter's transcript of the trial proceedings, in 16 volumes. Volumes 1 through 11 are consecutively paginated and only the page number will be included when they are referred to. Volumes 12 through 16 are each separately paginated. Accordingly, references to these volumes will include the volume and page number.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1959 (R. 46). A petition for rehearing was denied on May 4, 1959 (R. 47). The petition for certiorari was filed on June 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1852, forbidding the cutting or wanton destruction of timber growing on public lands, and the removal of timber with intent to export or dispose of the same, is the exclusive statutory sanction for the theft from public lands of logs belonging to the United States and for willful depredation of government property.

2. Whether the acquittal of petitioner's president and codefendant, through whom petitioner acted, requires reversal of petitioner's conviction.

3. Whether the trial court's instructions on the defense of honest mistake were erroneous.

4. Whether relevant and admissible evidence for the defense was erroneously excluded.

STATUTES INVOLVED

18 U.S.C. 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but

if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * * *

18 U.S.C. 1361 provides in pertinent part:

> Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, * * * shall be punished as follows:
>
> If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

18 U.S.C. 1852 provides:

> Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or
>
> Whoever removes any timber from said public lands, with intent to export or to dispose of the same; or
>
> Whoever, being the owner, master, pilot, operator, or consignee of any vessel, motor vehicle, or aircraft or the owner, director, or agent of any railroad, knowingly transports any timber so cut or removed from said lands, or lumber manufactured therefrom—
>
> Shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> This section shall not prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in-

the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; nor shall it interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.

STATEMENT

Count 1 of a two-count indictment (R. 3–5), filed February 8, 1957, in the United States District Court for the Northern District of California, charged petitioner, the Magnolia Motor & Logging Company, a corporation, and its president, R. Drew Lamb, with having stolen and converted to their own use, between June 1, 1953 and December 30, 1954, personal property of the United States, consisting of approximately 10,300 fir, cedar, and hemlock logs, in violation of 18 U.S.C. 641 (*supra*, pp. 2–3). Count 2 charged the same defendants with having, knowingly and willfully depredated, between June 1, 1953, and September 30, 1954, certain real property of the United States located in "Township 11½ North, Range 3 East, Humbol[d]t Meridian", in the Northern District of California, in violation of 18 U.S.C. 1361 (*supra*, p. 3). Following a trial by jury, the individual defendant, Lamb, was acquitted on both counts and the corporate defendant, petitioner, was convicted on both (R. 18). Petitioner was sentenced to pay a fine of $10,000 on each count (R. 24–25). On appeal, the Court of Appeals for the Ninth Circuit affirmed (R. 38–46).

The evidence adduced by the government may be summarized as follows:

The Bureau of Land Management, Department of the Interior, controls all federal public lands except those which have been specifically withdrawn from the public domain for use by another federal agency. In 1850, when California entered the union, the United States became the owner of all public lands that had belonged to Mexico before that time. This land, whether surveyed or not, still belongs to the United States and is subject to the control of the Land Bureau to the extent that it has not otherwise been sold, disposed of, or reserved for other purposes (Tr. 12–15, 59–60, 72–73).

Townships 11 and 12 North, Range 3 East, Humboldt Meridian (in Humboldt County, California)—between which the township here involved (numbered 11½) lies—were first surveyed in 1882 by two surveyors named Haughn and Foreman, who were contract employees of the Land Office.[2] Haughn surveyed Township 11, including its northern boundary (Tr. 41–42, 129). Foreman made a dependent survey of Township 12, which lay north of Township 11; *i.e.*, he worked from the northern boundary of 11, as estab-

[2] The method of survey and identification used by the government is as follows: Beginning with a given horizontal line (in this case, the Humboldt base line) and a given vertical line (in this case, the Humboldt meridian), the townships, which are normally six miles square in size, run north and south in tiers. The ranges run east and west. Each standard-sized township contains 36 sections, each section consisting of one square mile, or 640 acres (Tr. 32–35).

lished by Haughn, on the supposition that 11 and 12 had a common boundary (Tr. 129, 258).

The surveys of Townships 11 and 12 were suspended in 1884 because "an examination in the field [of Haughn's work] disclose[d] great irregularities" (Tr. 46, 130, 250–251). Thereafter, in 1886, the Land Office had Township 11 resurveyed by a surveyor named Gilcrest (Tr. 66). He established the northern boundary of Township 11 as being about one-quarter of a mile south of the line established by Haughn.[3] Since Gilcrest was not authorized to change the southern boundary of Township 12, and since Foreman's survey of Township 12 was reinstated in 1896, including his incorporation of Haughn's line as Township 12's southern boundary, this meant that a hiatus had developed between the townships. In other words, after Gilcrest's survey, the two townships had no common boundary, even though Gilcrest improperly marked[4] the northern boundary of Township 11 as though it was common with the southern boundary of Township 12 (Tr. 66, 131, 233, 274–277, 315–317).

Although this hiatus was not actually surveyed until 1954, and was not a matter of record within the Bureau of Land Management as a part of the sur-

[3] According to his field notes, Gilcrest never found the original boundary (Tr. 317–318).

[4] In modern times, the surveyor sinks a long pipe fitted with a brass cap into the ground at the corners (including interior corners) of the area he surveys. In earlier days in California, the surveyor would blaze trees, called witness or bearing trees, or, as shown by Gilcrest's field notes, sink corner posts (Tr. 10[illegible] 145–146; 13 Tr. 26–27, 43).

veyed public lands until March 30, 1956, when the survey was approved, a comparison of the plats of Townships 11 and 12 indicated the existence of unsurveyed land between them, since the shift in course of geographical figures, such as rivers, showed that they were not contiguous (Tr. 223–224, 388–389).[5] In addition, prior to the survey in 1954, the strip of land in question was shown as an unsurveyed area on maps having wide distribution. California State forestry maps, Department of Agriculture forestry maps, the county assessor's official atlas, and the Metsker Atlas of Humboldt County[6] all showed an outline of this strip as unsurveyed (and hence government-owned) land (Tr. 108–110, 354–357, 363–365, 444, 446, 448). Surveyors in the area, both government employees and private individuals, had gone over the ground at different times, found the two sets of markers or monuments, and concluded that the commercial maps were correct in showing that Townships 11 and 12 did not have a common boundary and that there was an unsurveyed strip, six miles long and approximately one-

[5] To ascertain the status, ownership, and boundaries of a particular tract of land it is always necessary to look at the tract book, the survey plat, and the surveyor's field notes (Tr. 111), and if there are discrepancies in the written records, the latter must give way to evidence of corners in place in the field (Tr. 107).

[6] A commercial publication used by the title company which acted as escrow agent in connection with the purchase of Townships 11 and 12 by Magnolia Lumber Sales (of which the individual defendant, Lamb, was a partner) from the Arrow Mills Company (see *infra*) (Tr. 944–945, 1114–1115, 1222–1223).

quarter of a mile wide, between them (Tr. 127, 132, 148–149, 808–816, 826.)

In 1950, Magnolia Lumber Sales, a partnership, through R. Drew Lamb, its operating partner and the individual defendant in this case, purchased a large tract in Humboldt County, including Townships 11 and 12, from the Arrow Mills Company (Tr. 553, 1234–1235, 1240). Although the head of the Arrow Mills Company claimed that he thought that he owned the then unsurveyed strip here involved, since he owned the land on both sides of it, and so informed Lamb at the time the sale was negotiated (Tr. 1112, 1121, 1123, 1126), Arrow Mills in fact promised only a quitclaim deed to this strip in the contract of sale and did not purport to convey title to the strip in the deed (Tr. 1129, 1131). The title insurance company refused to insure title to the strip (Tr. 945). Petitioner's counsel later inquired at the Bureau of Land Management and was told that there was no official plat or survey showing the hiatus, but that if there was an unsurveyed strip in the tract, it would belong to the government (Tr. 917–918, 925-927, 942, 949–950). On this basis, counsel testified that he told Lamb that there was no official gap between the townships.

In December 1951, Magnolia Lumber Sales, through Lamb, contracted to sell from its tract 300,000,000 board feet of lumber over a ten-year period to the Paragon Plywood Corporation (Tr. 545, 573–574, 601-602, 624). Paragon was aware, at the time of the contract, that there was an unsurveyed strip of land in Magnolia's tract (Tr. 559, 563–565), since it had in-

quired of and received a letter from the Bureau of Land Management saying that, while there was no record of a hiatus between Townships 11 and 12, title to unsurveyed lands was in the United States and that application for a definitive resurvey could be made. Moreover, Paragon had a timber-stand survey made of the tract and the results of that survey showed the unsurveyed area. Both the letter from the Bureau of Land Management and the timber-stand survey were shown to Lamb during the contract negotiations (Tr. 621–622, 636–637, 645; Def. Ex. J).

Pursuant to Magnolia Lumber Sales' contract, petitioner, a corporation of which Lamb was president, was given the prime contract to conduct the logging operations (Tr. 1233–1234). This involved felling the trees and bucking them into suitable lengths, trucking the logs to a river and floating them to Klamath, California, there loading them on trucks, and trucking them to the Paragon Plywood plant (Tr. 1254). In preparation for this operation, Lamb, together with a Mr. Ritchie, petitioner's sub-contractor to fell and raft the timber, and a Mr. Ryerson, who had managed Arrow Mills' prior logging operations in Humboldt County, went over Townships 11 and 12 in a jeep (Tr. 577–579). Ryerson expressly called the attention of Lamb and Ritchie to the unsurveyed strip, saying, "This is approximately the area that the unsurveyed area is in. It starts about in here" (Tr. 584).

Ritchie moved into the tract and harvested timber from March or April until November, 1952 (Tr. 585, 587–588), and Lamb was present at the site for a day or two each week. The operations map used by both

Ritchie and Lamb showed the unsurveyed area (Tr. 586, 589–591, 675). When Ritchie reached the unsurveyed strip the following season, in August 1953, Lamb instructed him to log through the strip and to disregard it completely, stating: "You know me," "I will settle with them [the government] for a dollar or two a thousand [board feet] the way I have done before" (Tr. 666, 670–672).

In 1954, Ritchie's part of the operation was taken over by the Yellow Creek Logging Company, and at the beginning of the season Lamb told a Mr. Wallace, Yellow Creek's general manager, that there were 12 million board feet of timber in the unsurveyed strip and that he intended to finish harvesting the area. Lamb also showed Wallace the area on the map. (Tr. 676–677, 857, 862, 883.)

In June and July of 1954, the hiatus between Townships 11 and 12 was surveyed, platted, and identified by the Bureau of Land Management as Township 11½ North (Tr. 148, 165–166). The surveyor in charge, a Mr. Wilson, found that the true north boundary of Township 11, as established by Gilcrest, had been re-marked some ten to twenty years before 1954, and that the blaze marks on trees identifying the boundary were clearly evident (Tr. 149–150, 184–185, 199–204, 346). Wilson's group also carefully retraced the old Foreman-Haughn survey of the southern boundary of Township 12 (the north edge of the hiatus) looking for evidence of the original corners (Tr 377–378). The surveyors found five corners (out of thirteen) identifiable as having been established by Haughn and adopted by Foreman. They established the other

eight corners by proportion (Tr. 380, 392, 395). The surveying party noticed that the brush along this boundary had been cut within the preceding few months, and scribe marks were blazed on two trees along the line (Tr. 379, 382-383).

When the surveyors saw Yellow Creek loggers harvesting timber within the government-owned strip (continuing the work started by Ritchie the preceding season), they informed Wallace, Yellow Creek's general manager, that his loggers were felling government trees. When Wallace told Lamb of the presence of government surveyors in the area, and what they had told him, Lamb ordered Wallace to eject the surveyors from the Magnolia lands (Tr. 167–170, 383–385, 680, 704, 874-875, 877).

As a result of petitioner's logging operation, Township 11½ was denuded, without the government's permission, of merchantable timber worth approximately $20,000 (Tr. 172–173, 179–182, 426, 539–540, 517–518). The timber was not harvested in such a way as to leave the area in a condition suitable for the production of more timber, nor were the area's other values, such as its wild life, fish, and usefulness as a watershed, safeguarded (Tr. 432–433). The trees cut were not fully utilized, a large amount of debris was left on the ground so that seed would have little chance to grow, and the stream in the area was clogged with unrecovered logs (Tr. 434, 467).

ARGUMENT

The decision below is correct and further review by this Court is not warranted.

1. The gist of petitioner's first contention (Pet. 2–4, 14) is that 18 U.S.C. 1852 (*supra*, pp. 3–4)—making it a misdemeanor to cut or wantonly destroy timber growing on the public lands of the United States or remove timber from such lands with intent to export or dispose of the same—overlaps 18 U.S.C. 641 and 1361 (*supra*, pp. 2–3)—punishing, respectively, the theft of, and willful depredations against, any property of the United States. It is also contended that Section 1852, relating as it does to timber growing on the public lands of the United States (the subject matter of this case), is a more specific provision than either of the other two sections, relating generally as they do to any property of the United States, and that, under the principle that "[w]here two statutory provisions apply to the same set of facts, one applying only to a specific fact situation, and the other applying generally to all similar fact situations, the specific provisions will control the general" (Pet. 3), petitioner's offense, if any, was solely against Section 1852. Thus, it is argued that it was error to base this prosecution on Sections 641 and 1361, the more general statutes.[7] We submit that there is no neces-

[7] Petitioner also suggests that 18 U.S.C. 1853, as well as 18 U.S.C. 1852, overlaps Sections 641 and 1361 (see Pet. 3). However, Section 1853, by its terms, is limited to the cutting or injuring of trees growing upon lands of the United States which have been reserved or purchased by the United States for public use, or upon Indian reservations or lands occupied by an Indian tribe under the authority of the United States, or upon Indian allotments while title thereto is held in trust by the government or while the allotment is to remain inalienable by the allottee without the consent of the United States. The strip of land involved in this case falls into none of these categories.

sary overlap between these sections and that, in any event, prosecution under the general theft and depredation statutes would not be barred even if there were some overlap.

(*a*) 18 U.S.C. 641 provides in broad terms for the punishment of anyone who "embezzles, steals, purloins, or knowingly converts to his use or the use of another" any "thing of value of the United States." As both the District Court and the Court of Appeals noted (R. 9, 43), this section applies only to the theft (or embezzling or conversion) of personal property belonging to the United States, and a criminal intent to steal is an element of the offense. *Morissette* v. *United States*, 342 U.S. 246, 247–273. The first portion of Section 1852, on the other hand, reaches anyone who "cuts or wantonly destroys any timber growing on the public lands of the United States." Since growing timber is real property and not personal property, *Northern Pacific Railroad* v. *Paine*, 119 U.S. 561, 564; *Capoeman* v. *United States*, 110 F. Supp. 924, 926 (W.D. Wash.), affirmed *sub nom. Squire* v. *Capoeman*, 220 F. 2d 349, affirmed, 351 U.S. 1, and since larcenous intent is not part of the offense defined by the first portion of Section 1852, that portion of Section 1852 and Section 641 plainly reach different kinds of proscribed conduct. The second portion of Section 1852, prohibiting simply the removal of any timber from public lands "with intent to export or to dispose of the same," does not, on its face, require the showing of the specifically larcenous intent required by Section 641. To find a defendant guilty under this part of Section 1852, the jury need

only find that he had a purpose to obtain the timber in violation of the law. *Teller* v. *United States,* 113 Fed. 273, 275 (C.A. 8).

With respect to count 2, charging petitioner with willful depredation against property of the United States in violation of 18 U.S.C. 1361 (*supra,* p. 3), it is to be noted that, as observed by the Court of Appeals (R. 43), the prosecution's evidence went far beyond showing the mere harvesting of timber. It was also shown that petitioner had, among other things, so despoiled the land itself by littering it with debris as to impede natural reseeding and its eventual restoration. These acts of despoliation were all harmful acts within the scope of Section 1361, forbidding willful depredation "against any property of the United States", but were outside the ambit of Section 1852, which is limited to the cutting, destruction and removal of timber.

More broadly, Section 1852 has been applied almost exclusively in cases where an entry has been made on public lands and the timber cut ostensibly for the purpose of clearing the land for cultivation, fencing, and establishing a homestead, but actually for the sake of the timber. In short, as the last paragraph of Section 1852 indicates, the intent of Congress in enacting this statute was to restrict the cutting of timber on public lands to cutting for the improvement of the land rather than for the timber itself. See *Shiver* v. *United States,* 159 U.S. 491, 497–499.

(*b*) In any event, the criminal statutes of the United States need not interlock, with no gaps or overlap. Many statutes do overlap, and it is not un-

common for a single act or transaction to violate more than one provision. *Harris* v. *United States*, 359 U.S. 19, 23; *Gore* v. *United States*, 357 U.S. 386, 389; *Pereira* v. *United States*, 347 U.S. 1, 8–9; *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *United States* v. *Gilliland*, 312 U.S. 86, 95–96; *United States* v. *Noveck*, 273 U.S. 202. "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law * * *". *Rosenberg* v. *United States*, 346 U.S. 273, 294 (opinion of Mr. Justice Clark).* In such a situation, the prosecution may be for a felony even though the government could have elected to prosecute for a misdemeanor. *United States* v. *Gilliland*, *supra*; *United States* v. *Noveck*, *supra*.

In this case, petitioner engaged in an unlawful course of conduct extending over a long period of time. A misdemeanor prosecution for cutting and removing timber would not have provided punishment for the harm done to the land itself, nor would it have taken into account the intent to steal. The prosecution for larceny and willful depredation, on the other hand, reached separate acts and aspects of a prolonged course of conduct. When the trees had been felled and bucked into log lengths, and the land littered and despoiled, the offense of depredation against property of the United States, proscribed by 18 U.S.C. 1361, was committed. The actual asporta-

*If the prosecution seeks to invoke both, the question which arises is one of double jeopardy, the answer depending upon whether each offense requires the proof of an ultimate fact not essential to the other. *Harris* v. *United States*, 359 U.S. 19, 23.

tion of the logs constituted the separate offense of theft of government property, in violation of 18 U.S.C. 641.

It is not enough to say, as petitioner does (Pet. 3), that the misdemeanor statute, Section 1852, is more specific than Sections 641 and 1361, the felony statutes.[9] Section 641 is specifically limited to larceny and other offenses of that type, and Section 1361 is limited to willful injuries and depredations. From this point of view, Section 1852 is broader than either, since it encompasses every sort of offense against timber on public lands, no matter how minor. However, the conduct proscribed by Section 1852 is less broad than petitioner's course of conduct. Petitioner did not merely cut or damage timber; it also damaged land. Petitioner did more than remove logs with intent to "dispose of" them; it stole them.

2. The jury's acquittal of petitioner's president, Lamb, does not require the setting aside of the verdict as to it, on the ground that the only criminal activities attributable to it were the activities of Lamb (Pet. 4–5). It has always been the rule that inconsistency in verdicts is not a ground for reversal of a conviction which is otherwise supported by the evidence. Whether a jury's inconsistent verdicts are the result of carelessness, or compromise, or a belief that the penalty should merely increase the cost of running the business, is immaterial. "Juries may indulge in precisely such motives or vagaries." *United States*

[9] The offenses defined by Sections 641 and 1361 are felonies except where the value of the property stolen or despoiled does not exceed $100 (see *supra*, pp. 2–3).

v. *Dotterweich*, 320 U.S. 277, 279; see *Hoag* v. *New Jersey*, 356 U.S. 464, 472; *Dunn* v. *United States*, 284 U.S. 390. The rule is not different when the only officer or officers through whom the corporation has acted are acquitted. As was said in *United States* v. *General Motors Corporation*, 121 F. 2d 376, 411 (C.A. 7), certiorari denied, 314 U.S. 618:

> The question on review should not be whether the verdict against the corporation is consistent with the acquittal of the individuals. Rather it should be whether the conviction is consistent with the evidence. In other words, we believe that the acquittal of the officers and agents, even if they had been the only persons through *whom the corporations could have acted*, should not operate without more to set aside the verdict against the corporations. * * * [Emphasis added.]

See also *American Medical Association* v. *United States*, 130 F. 2d 233, 252–253 (C.A.D.C.), affirmed, 317 U.S. 519; *Southern Advance Bag & Paper Co., Inc.* v. *United States*, 133 F. 2d 449, 450–451 (C.A. 5). Here, the evidence supporting petitioner's conviction on both counts is overwhelming.

3. Petitioner's contention (Pet. 16) that the trial court, by instructing the jury that the strip of land in question legally belonged to the United States, in effect told them to disregard petitioner's defense of honest belief that Magnolia Lumber Sales owned the entire timber area, including the unsurveyed strip, is without merit. The trial court instructed the jurors that the means by which the government disposes of

land was not particularly relevant to this case because (14 Tr. 36–37)—

> the question for you to decide is whether or not the defendant [Lamb] knew or honestly believed that he or the corporation owned this particular area. He might have been mistaken * * * but, if from where he stood and looked he believed honestly that it belonged to him and that he was justified in acting as he [and] the corporation did, then, of course, there's absent and lacking any criminal intent; and, under those circumstances, the verdict required by the law must be not guilty.

This instruction fairly posed the defense of honest mistake, and petitioner does not suggest any way in which it could have been improved. It informed the jury that an honest mistake as to ownership would negate criminal intent and require a verdict of not guilty.[10] See *United States* v. *Kemble*, 197 F. 2d 316, 321 (C.A. 3).

4. While cross-examining the prosecution's first witness (Walter Beck, the manager of the Sacramento office of the Bureau of Land Management (Tr.

[10] To suggest, as petitioner seems to (Pet. 16), that the official government survey, which was made in 1954 and approved in 1956, created the land in controversy, and that the land did not exist until that time, is manifestly untenable. The evidence clearly permitted the jury to find that Townships 11 and 12 had no common boundary, and that what is now Township 11½ was, at the time of the offenses charged, an unsurveyed strip of land between Townships 11 and 12, about which petitioner was fully cognizant. Township 11½ was not carved out of either Township 11 or 12. It was simply the official label attached to an existing, newly surveyed area. The fact that the official plat was not filed until 1956 obviously [cont'd]

2-3)), defense counsel referred to two documents (jointly identified in the record as Defense Exhibit H for identification (Tr. 83)) consisting of (1) a letter sent to the Bureau of Land Management, Washington, D.C., by someone who was not a party to this prosecution and not identified in the record, and (2) a reply to the letter sent by the Sacramento office on May 10, 1955 (Tr. 83-85). When the letters were offered in evidence as "negativing the Government's claim to ownership in the subject hiatus" (Tr. 85), the prosecution objected on the ground that the sender of the original letter had not been shown to be connected with either defendant, and that the reply had not been sent by the witness then testifying (Tr. 86). The trial judge excluded the exhibit on these grounds (Tr. 87). Petitioner's contention (Pet. 17) that the exclusion of this proffered exhibit was prejudicial is without merit. It was an appropriate exercise of discretion for the trial judge to exclude these proffered documents. In addition to their objectionable character as hearsay, even if it be assumed that the reply of the Sacramento Office of the Bureau of Land Management was to the effect that the land hiatus in question was not a matter of record, such a reply, even if it had come to petitioner's attention, could have had no tendency to engender in

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does not mean that the land in question was not in existence until then (Tr 1431-1432).

The patent to land in Townships 11 and 12, referred to by petitioner (Pet. 9), described contiguous tracts only if it is assumed that the townships had a common boundary. The patent itself did not describe the lands as contiguous (Tr. 340-348).

it, at the time of the acts of theft and depredation charged in the indictment, an honest belief that the hiatus did not exist, since the reply was not written until May 1955, several months after the offenses had been committed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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